STATE OF MICHIGAN

COURT OF APPEALS

BEAVERTON TRANSIT MIX, INC., NORBERT VERMEESCH, and GERALDINE VERMEESCH, Plaintiffs/Counter-Defendants-Appellees,	UNPUBLISHED October 21, 2003
v	No. 238931 Gladwin Circuit Court
RICHARD LEE ONWELLER, Defendant/Counter-Plaintiff-Appellant.	LC No. 00-014448-CK

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant, Richard Lee Onweller, appeals as of right from a judgment in favor of plaintiff, Beaverton Transit Mix, Inc. (BTM) in the amount of $52,282.20. We affirm.

I. Facts

Norbert Vermeesch owns BTM, which sells concrete products. In the early 1990s, Vermeesch and his wife lent Onweller $8,500 to buy steel forms for making concrete septic tanks. BTM then began selling concrete to Onweller on an open account, but Onweller was apparently inconsistent about paying. BTM eventually put Onweller on a cash on delivery basis.

On October 30, 1998, Onweller signed a security agreement in which he agreed to pay Vermeesch and his wife $55,000, representing $40,643.46 owed to BTM for concrete, and $14,356 owed to Vermeesch and his wife for the personal loan. As security, Onweller agreed to pledge a backhoe, a bulldozer, a delivery truck, and the steel septic tank forms he had purchased in the early 1990s. Onweller did not satisfy his obligations under the terms of the agreement. BTM sued to enforce the security agreement. This appeal ensued.

II. Trial Court's Factual Determination

A. Standard of Review

We review a lower court's findings of fact under the clearly erroneous standard. MCR 2.613(C); *Morris v Clawson Tank Co*, 459 Mich 256, 275; 587 NW2d 253 (1998).

B. Analysis

Onweller made ten payments on the security agreement totaling $8,800. At the time the complaint was filed, however, he still owed $52,046.72. After a bench trial in which Onweller represented himself, the trial court found that he did owe that amount and entered a judgment against him in favor of BTM for a total amount, including costs, of $52,282.20.

Onweller first argues that the trial court erred by finding that there was an open account arrearage and that the loan agreement reflected the consolidation of that arrearage and the amount owed on the personal loan. The trial court found that:

> [T]here was an open account basis that was being carried on so that the Defendant could do his septic tank business, and the plaintiff was in the cement business.
>
> This situation continued until approximately 1997. During that period of time, from the checks that have been submitted, it's apparent that there was this open account and that the Defendant made considerable payment on that open account. He admitted that he didn't make any payments on the personal loan of some $8,500.
>
> It appeared apparently to the plaintiff, in approximately 1997, that there was a considerable arrearage on the open account, plus the fact that no personal loan payments had been made. And as a consequence there was an attempt then in 1998 to consolidate both the personal loan and the open account arrearage into an installment loan agreement.
>
> As a result of this, Plaintiff's Exhibit 2 was entered into and signed by the parties, and the amount involved that was being included in that, this Court finds to be $55,000.

Although Onweller testified that the amount financed had not been filled in when he signed the agreement, that he never borrowed $55,000 from Vermeesch, and that he thought he was signing an agreement to pay the $8,500 loan, his testimony was inconsistent and not credible. While the canceled checks Onweller submitted do show that he paid considerable money to BTM over a six-year period, they do not explicitly support his argument that they show he paid the arrearage on the open account. Instead, because most of the earlier-dated checks are made out in large, even numbers such as $6,000 and $2,000, and the later-dated checks are made out in smaller, fractional amounts such as $324.16 and $194.62, they support Vermeesch's assertion that Onweller began by making payments on an open account and then was forced to pay each time concrete was delivered.

A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). The trial court's findings were well supported by the evidence adduced at trial; therefore, they were not clearly erroneous.

III. Motion For New Trial

A. Standard of Review

Whether to grant or deny a motion for a new trial is entrusted to a trial court's discretion, which requires appellate review for an abuse of that discretion. *Hilgendorf v St John Hosp*, 245 Mich App 670, 682; 630 NW2d 356 (2001). A trial court abuses its discretion by rendering a decision when an unbiased person would conclude, after consideration of the facts relied on by the trial court, that there was no justification or excuse for the decision. *O'Neill v Home IV Care Inc*, 249 Mich App 606, 612; 643 NW2d 600 (2002).

B. Analysis

Onweller next argues that the trial court erred when it denied his motion for a new trial. We disagree.

Onweller bases his arguments on MCR 2.611, which allows a court to grant a new trial when a party's substantial rights are materially affected due to "[i]rregularity in the proceedings of the court." MCR 2.611(A)(1)(a). Onweller argues that there was an irregularity in this case because the issues tried were different from the issues raised in the pleadings, but does not actually develop this argument in his brief. Instead, he states that, "[t]he Court decided the issue of whether the loan agreement was in fact an agreed-upon consolidation of a personal loan from the Plaintiffs to the Defendant and an account receivable balance owed by the Defendant to the Plaintiffs."

Onweller's arguments on this issue are without merit. The complaint alleged in part that "[t]he plaintiffs loaned $55,000 to the defendant in October of 1998," and "[t]his action is based upon a security agreement debt." The trial court found that "Plaintiff's Exhibit 2 [the security agreement] was entered into and signed by the parties, and the amount involved that was being included in that, this Court finds to be $55,000." These findings were consistent with the pleadings. Thus, there was no irregularity and the trial court's denial of the motion for a new trial was not an abuse of discretion.

IV. Second Summons

A. Standard of Review

Where a party raises an issue not preserved for appeal, we review the record for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Id.*

B. Analysis

Finally, Onweller argues that the trial court erred when it allowed plaintiffs to file their petition for a second summons instead of dismissing the action without prejudice. He did not

raise this issue below; therefore, it is not preserved. *Fast Air, Inc v Knight,* 235 Mich App 541, 549; 599 NW2d 489 (1999).

The complaint was filed on September 8, 2000. On November 13, 2000, plaintiffs argued their motion for possession, but Onweller argued that he had not been served, and the trial court held that it could not proceed in the absence of service on him. The court granted plaintiffs petition to issue a second summons on January 13, 2001. Onweller was actually served on January 31, 2001. The initial summons was valid for ninety-one days from the date the complaint was filed, or until December 8, 2000. MCR 2.102(D). That court rule allows a court to issue a second summons within that ninety-one day period, but the petition for a second summons was not filed until January 22, 2001. On December 9, 2000, when the summons had expired, the action should have been deemed dismissed. MCR 2.102(E)(1). It was error for the court to hear plaintiffs' motion for a second summons rather than to dismiss the action without prejudice. Thus, the error in this case satisfies the first two *Kern* requirements: error occurred, and it was obvious. *Kern, supra* at 336.

However, the error did not affect Onweller's substantial rights. Even had the court dismissed plaintiffs' action, the dismissal would have been without prejudice under MCR 2.102(E)(1). Plaintiffs could have refiled the complaint. There was no showing that the failure to dismiss and refile changed the amount owed by Onweller or the fact that he had signed the security agreement. A new action would have resulted in the same verdict as did this action. Because the error did not affect substantial rights, we decline to reverse on this issue. *Kern, supra* at 336.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Bill Schuette